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# Dora H. Stevens, Connie Joy Leigh, Jack Holt Stevens and Alice Dayle Esplin v. Colorado Fuel & Iron, a Corporation, For Whom United States Steel Corporation Has Been Substituted, and Employers Mutuals of Wausau : Brief of Appellants

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# In The Supreme Court
## Of The State of Utah

DORA H. STEVENS, CONNIE JOY LEIGH, JACK HOLT STEVENS and ALICE DAYLE ESPLIN,

Plaintiffs and appellants,

vs.

COLORADO FUEL & IRON, a corporation, for whom UNITED STATES STEEL CORPORATION has been substituted, and EMPLOYERS MUTUALS OF WAUSAU, a corporation,

Defendants and Respondents.

Case No. 11808

**BRIEF OF APPELLANTS**

NATURE OF THE CASE

This case calls for a review of a memorandum decision of the Honorable C. Nelson Day, District Judge of the Fifth Judicial District of Utah on a case arising out of the District Court of Iron County, Utah, said memorandum decision being dated the 26th day of July, 1969, filed by the Clerk on the 29th of July, 1969. This matter arose on a motion to dismiss and motion to strike off the defendant United States Steel Corporation, dated the 26th day of August, 1966, argued thereafter and taken under advisement for a considerable period of time thereafter. The motion to strike was not acted upon. The memoraudum decision granted the motion to dis-

miss, in effect saying that the amended complaint of the plaintiffs should be dismissed for failure to state a claim upon which relief could be had.

## DISPOSITION IN LOWER COURT

This matter was originally filed naming Colorado Fuel & Iron, a corporation, and Employers Mutuals of Wausau, a corporation, defendants, upon a mistaken concept of the factual situation pertaining to the death of one Albert W. Stevens who died as an employee of Utah Construction & Mining Company out of an accident that occurred on the 19th day of August, 1964, the death occurring the 21st day of August, 1964. This original complaint was filed upon a theory that Utah Construction Company was an operating Company for Colorado Fuel & Iron, and Colorado Fuel & Iron had failed to make the place safe for the employees of Utah Construction Company. Employers Mutuals of Wausau, a corporation, was joined, inasmuch as a maximum award had been made by the Utah State Industrial Commission on the death, and Employers Mutuals of Wausau was and is paying periodic payments on the death of Albert W. Stevens based upon this finding. Upon being apprised and ascertaining that the death actually occurred on a different operation from the original concept, plaintiffs filed a motion to substitute United States Steel Corporation for Colorado Fuel & Iron. This substitution was allowed by the court. Also an amended complaint was filed by permission of the court. A motion to dismiss of Employers Mutuals of Wausau was denied and said defendant was given twenty days to answer. Said defendant was so noticed on the 17th day of December, 1965, but no answer for said defendant has been filed to date. Although the default has never been entered, Employers Mutuals of Wausau is in default.

When it was ascertained that the plaintiffs' original concept of the operation on which the death occurred was erroneous, the Honorable C. Nelson Day granted a motion to file an amended complaint and motion for substitution of parties, allowing United States Steel Corporation to be substituted as defendant for Colorado Fuel & Iron, a orporation, and a voluntary dismissal as against Colorado Fuel & Iron was effected. Service was obtained on United States Steel Corporation who made an entry of appearance in the due course of events. The primary change in the amended complaint, in addition to changing the parties, was moving the site of the accident to the place where the accident that caused the death actually occurred. Albert W. Stevens, before his death, had been shifted to an operation of Utah Construction Company in connection with Colorado Fuel & Iron, in which Utah Construction was an operating company for Colorado Fuel & Iron, and the morning on which the accident occurred from which he died, Albert W. Stevens was shifted back to the operation conducted by Utah Construction Company either as an operator or as a tenant of United States Steel Corporation. The motion to dismiss of United States Steel Corporation filed in 1966 was granted in 1969.

## RELIEF SOUGHT ON APPEAL

Plaintiffs-appellants seek to have the Supreme Court review the trial court's action in allowing the motion to dismiss the amended complaint as served against United States Steel Corporation, and to have the act of dismissal set aside and the defendant United States Steel Corporation required to answer, and the matter go to a jury trial.

## STATEMENT OF FACTS

The plaintiffs-appellants are the widow and the heirs at law of the late Albert W. Stevens, deceased. The plaintiff, Dora H. Stevens, in addition to being a wodow, is a dependent of said Albert W. Stevens, deceased. Long prior to the death of Albert W. Stevens, a subsidiary of United States Steel Corporation, to-wit, Columbia Iron Mining Company, owned and operated mining claims on the Lindsay Hill in the Iron Springs Mining District in Iron County, Utah. On or about the 13th day of December, 1963, said corporation merged with United States Steel Corporation, and at the time complained of, these claims were the property of United States Steel Corporation. Some of the records of Iron County have not been changed to show this merger, but since the 13th day of December, 1963, all claims in the Lindsay Hill area of the Iron Springs Mining District that were formerly owned by the Columbia Iron Mining Company have actually been owned by the United States Steel Corporation. This was the condition on or about the 19th day of August, 1964, to and including the 21st day of August, 1964.

On or about the 31st day of December, 1949, the Coluumbia Iron Mining Company and Utah Construction & Mining Company entered into a document called an operating agreement by the terms of which Columbia Iron Mining Company attempted to sell said Utah Construction & Mining Company ore in the area on said Lindsay Hill known as the Lindsay, Wanderer, Little Allie, Belgium and Cora No. 1 Lode Mining Claims, under the terms of which said agreement said ore could be removed and stockpiled and later sold. There was no obligation to pay for said ore until it was sold, and nothing was paid upon removal. There was a specific provision that any ore sold to Columbia Iron Mining Company

would be sold without a royalty having been paid on same, and Utah Construction & Mining Company was paid for removing the ore under these conditions by some method not set forth in the agreement. Columbia Iron Mining Company was the primary purchaser and purchased in excess of 95% of all ore so removed, and as a matter of practice, this amounted to an operation agreement whereby Utah Construction was paid for the removal of ore by Columbia Iron Mining Company. No co-mingling of ore was allowed in the stockpiles, even though stockpiled on property of Utah Construction & Mining Company, and only at the time of shipment was any co-mingling allowed. Also, the only time there was any payment to be due to Columbia Iron Mining Company from Utah Construction was in the event ore was sold to any other party in accordance with the royalty provisions. As a matter of practical fact, United States Steel Corporation was the only purchaser of the ore from these mining claims under said agreement, and as a matter of practical operation, said agreement was nothing but an agreement for the removal of ore, the property of Columbia Iron Mining Company, by Utah Construction Company. The reason for said agreement is immaterial as far as this suit is concerned.

In 1961, this agreement was modified, but in no way changed the principal agreement. Although said agreement contained a provision for the payment of royalty, as a matter of fact this provision was not effective until the iron ore was actually sold to someone else, and in the event the ultimate consumer was Columbia Iron Mining Company, there was never any amount paid under the royalty provisions of the agreement.

At the time of the merger, on or about the 13th day of December, 1963, United States Steel Corporation,

the defendant, took over the position of Columbia Iron Mining Company, and under those conditions became a party to those agreement directly. Since that time United States Steel Corporation has been the only purchaser of said mined ores under said agreement, and Utah Construction & Mining Company has never paid any royalty under the terms of said agreement. As a matter of practical effect, this agreement is nothing but an operation agreement by the terms of which the Utah Construction and Mining Company operated the area in question for United States Steel Corporation.

Albert W. Stevens, deceased, had worked for Utah Construction Company long prior to the merger. During the two weeks prior to the 19th of August, 1964, Albert W. Stevens had not been working in this particular area, but had been working in a different area for a different crew, still in the employment of Utah Construction & Mining Company. This was on the Colorado Fuel & Iron operation. On the morning of the 19th of August, 1964, Albert W. Stevens returned to the crew he had been working with, and was instructed to dump low-grade ore from the claims of United States Steel on low-grade stockpile No. 8. While he had been away from the crew, the end of this stockpile had been undermined. and there was a precipitous face on same approximately 80 feet in height. There were no safety provisions whatsoever for the dumping by trucks. The truck operated by Mr. Stevens had a gross weight of approximately 110 tons, and carried approximately 70 tons of ore. Normal procedure was to back this truck to the edge and hoist same, dumping the ore over the edge of the stockpile. On a normal slope, this was normally a safe operation. However, on a precipitous slope, this placed the entire weight of the truck on the two rear wheels within a few inches of the edge of the precipitous slope which had been undermined during the

absence of Mr. Stevens, and of which he had no knowledge, and on which there were no safety precautions taken whatsoever. The bank gave way and the truck cartwheeled down the slope with the cab being on the outside of the cartwheel, and Mr. Stevens landed on his head on the roof of the steel cab. He died from his injuries two days later. This particular pile of low-grade ore was the exclusive property of United States Steel Corporation under the provisions of the so-called operating agreement, and the pile contained no ore except that removed from claims of United States Steel Corporation. The ore had not been paid for under any operating or lease agreement by Utah Construction Company at the time of said accident, and there was no duty to pay for same until it was removed from said stockpile, even if sold to another party. As of the 19th day of August, 1964, no flags or warning of any kind were put into effect by either United States Steel Corporation or Utah Construction & Mining Company, or any person or persons working for either company as to the dangerous condition of the east end of said low-grade ore stockpile No. 8. No inspections had been made of same whatsoever by either United States Steel Corporation or Utah Construction & Mining Company. Had inspections been made on a regular basis this condition would have been ascertained, and had it been ascertained, reasonable steps should have been taken for the safety of operating personnel.

At the time of his death, Albert W. Stevens had been steadily employed as a truck driver by Utah Construction & Mining Company for several years, and on said date was approximately 54 years of age, and was steadily employed at a wage scale of $3.285¼ per hour, working eight hours per day for five days a week. He was not at any time advised that said low-grade stockpile No. 8 was in any other than a normal condition, or

that a precipitous condition had been created on the east end thereof. Only one load of ore had been dumped on this day previous to Mr. Steven's first trip there, and this ore was not dumped over the precipitous end. At the time of the injury which resulted in the death of Mr. Stevens, qualified engineers and safety personnel were available to United States Steel Corporation on a permanent basis, within a few miles of said low-grade stockpile on which said accident occurred that caused his death, had said defendant, United States Steel Corporation seen fit to inquire as to the conditions under which these men worked.

The purpose of maintaining said low-grade stockpiles No. 8 was exclusively for removing the ore from same to answer ore requirements of United States Steel Corporation, and said stockpile was used exclusively to store ore removed from the claims of United States Steel Corporation. Said ore was being held in said stockpile for the exclusive benefit of United State Steel Corporation as a matter of practical effect. The removal of said ore was controlled by the ore requirements of United States Steel Corporation, and this ore, at the time of the injury and death of Albert W. Stevens, was one of the primary sources of ore for the Geneva works of United States Steel Corporation. At no time were safety inspections made by United States Steel Corpor-tion. United States Steel Corporation, as owner of said ore had a duty to inspect to see that all employees were working under safe conditions. This duty applied to employees of contractors as well as employees of United States Steel Corporation. United States Steel Corporation did not perform this duty at all.

Almost immediately after the truck driven by said Albert W. Stevens, deceased, toppled over the precipitous edge of the stockpile, material was caused to be

dumped as a barricade several yards west of said precipitous edge, so that it would be impossible for another vehicle to approach said edge, but this action of barricading was not a normal precaution and was not done on other low-grade stockpiles or waste piles that did not have a precipitous edge as did low-grade stockpile No. 8.

On or about the 1st day of October, 1964, the Industrial Commission of Utah made an order requiring the defendant Employers Mutuals of Wausau to pay to the plaintiff, Dora H. Stevens, as dependent wife of said Albert W. Stevens, the sum of $12,002.00 in payments of $42.85 per week, commencing the 19th day of August, 1964, and continuing for 280-1/7 weeks. By the provisions of Title 35-1-62, Utah Code Annotated 1953, and amendments thereto, said defendant, Employers Mutuals of Wausau, is subrogated to the rights of the plaintiff for the amounts it has actually paid under said award.

Said agreement between Columbia Iron Mining Company and Utah Construction & Mining Company has not been revised since the merger. The price paid per ton by United States Steel Corporation has not been commensurate with the market price of ore of the same quality at the time of delivery, and the practical effect of said agreement is that it is an operating agreement for the mining of iron ore by Utah Construction & Mining Company as an agent of United States Steel Corporation. At all times, said mining and stockpiling has been controlled by the dictates of the Geneva works of United States Steel Corporation, and at all times the ore in said stockpile No. 8 has been the property of United States Steel Corporation and has been kept in existence and segregated as such primarily for the use and benefit of United States Steel Corporation at its Geneva Works.

## ARGUMENT

### Point I

### THE TRIAL COURT ERRED IN ITS MEMORANDUM DECISION OF 26 AUGUST 1969.

It is quite apparent that the trial court erred in this matter. Finding No. 6 shows that plaintiffs' attorney entirely failed to make the trial court even remotely aware of the position of the plaintiffs. This finding states, "The Court is of the opinion, and so finds, that the said decedent Stevens was not in the category of and employee of the United States Steel Corporation. All of the Utah cases appear to base the test of employer-employee relationship on the right of supervision and control. In this case there appeared to be none whatever."

This can only show the entire failure of the trial court to grasp the situation that the plaintiffs were faced with. At no place in any pleading, memorandum, or any other item, was the statement ever made that the decedent was an employee of United States Steel Corporation. The entire effort of the plaintiffs had been on the basis that United States Steel Corporation was a third person with a duty to make the entire area safe for the employees of its contractors under the provisions of Title 35-1-62, Utah Code Annotated, 1953, and amendments thereto. The test the trial court applied, and upon which it based its decision, was an employee-employer relationship.

The trial court entirely failed to make any finding whatsoever as to whether or not United States Steel was a third party under the provisions of Title 35-1-62, Utah Code Annotated, 1953. Although this was mentioned in Paragraph 5 of the memorandum decision as

the contention of the plaintffs, there is no finding whatsoever on this point. Until there is a finding on this point, this matter is not settled.

The other part of defendant's motion for dismissal which apparently is not acted upon by the court, is that workmen's compensation award is a bar to recoverey by the plaintiffs from the defendant. This is specifically contrary to the provision of Title 35-1-62, Utah Code Annotated, 1953. Cases are legion that the only person who is protected under this provision is the employer, Utah Construction Company, and may be found in Johanson v. Cudahy Packing Co. 107 Utah 114, 152 P2d 98, and various other items, and 101 Utah 219, which denies a rehearing on this case. This Johanson v. Cudahy Packing Company decision was approved and followed by the Federal Courts in Jay v. Chicago Brides and Iron Co. 150 Fed 2d 247.

The pleadings specifically alleged the death of Albert W. Stevens, deceased, to be as a result of United States Steel Corporation's failure to perform certain acts it had a duty to perform. The theory in the case of Rugg v. Tolman, 39 Utah 295 117 P 54, 57, which sets out the basis of justifying a recovery of exemplary damages to the effect that the act causing the injury must be done with an evil intent, has now been refined to a question of "Positive misconduct manifesting a conscious disregard of the rights of others and reckless indifference to consequences." This is set forth in Wilson v. Oldroyd, 1 Utah 2d 362, 267 P2d 759. This is also affirmed in the case of Calhoun v. Universal Credit Company, 106 Utah 166, 146 P2d 284. This has even been carried to the rendition of damages in a suit for trespass by horses. Punitive damages were upheld and allowed by the trial court and the Supreme Court of Utah in the case of Powers v. Taylor, 14 Utah 2d 152, 379 P2d 380, on the basis "Defendant's wrong persisted with an in-

difference to the consequences and to plaintiff's rights."

Certainly under the case at bar, we have a complete indifference to the consequences by failure to make an inspection and to make the place safe for a man to work and to handle this tremendously heavy machinery. Certainly, creating a trap of this nature, where a precipitous bank is made 80 feet high without support, with ore to be dumped over the end of it by trucks weighing in excess of 100 tons, in which the dump mechanism places all the weight on the back, demonstrates a callous and indifferent attitude for the safety of employees, and demonstrates an indifference to the consequences and to the rights of an employee. Certainly this is a reckless desregard of the rights of an individual, and evidences a wrongful motive as well as intent of indifference to the consequences.

The right to sue someone besides an employer for an item of this nature, where there is a duty on other people to make places safe for employment, is set forth in Johnson v. Cudahy Packing Co., 152 P2d 98, 107 Utah 114. This case and the cases following it are leading cases to the effect that third parties may be sued under these conditions, regardless of the Workmens Compensation Act. In the case of Rogalski v. Phillips Petroleum Co., 3 Utah 2d 203, 282 P2d 304, plaintiff was cleaning an employer's truck, who was a distributee of defendant, cleaning being on the premises of the defendant. Plaintiff fell off the ramp into a vat of caustic soda. Employer was covered by the Workmen's Compensation Act, and compensation was paid thereunder. In this case, the Supreme Court of Utah held that the action could be maintained against the third party, regardless of the compensation, and that although the compensation carrier had a right of action against the defendant, same was not exclusive, with the following state-

ment, "The duty owed by an owner of land to a business visitor is to inspect and maintain his premises in a reasonably safe condition or to warn the visitor of any dengerous conditions existing thereon."

This is exactly the same situation we have in the case at bar: Ore owned by United State Steel was put in a stockpile. At no time was there every any safety inspection. For this fact, see the deposition of Clayton S. Lewis, Page 9, Line 25, to Page 11, Line 12, and Page 20, Line 6, to Page 21, Line 26. There was never any check by the United States Steel Corporation. See the deposition of Clayton S. Lewis, Page 21, Line 13, to Page 21, Line 26, and if there is any question concerning the ownership of the ore, see the statements in the depositions concerning the ore being stockpiled according to ownership and the claims it came from: The deposition of York Jones, Page 18, Line 24, to Page 19, Line 29; the deposition of Clayton S. Lewis, Page 3, Line 20, to Page 6, Line 7, and Page 8, Line 16 to Page 9, Line 24; the deposition of Morton E. Pratt concerning co-mingling of ores not being done in the low-grade stockpiles, and piles being kept separate based upon the claims they came from, Page 12, Line 19, to Page 13, Line 12, and Page 15, Line 12, to Page 17, Line 6.

Concerning the general operation of the stockpile, see the deposition of York Jones, Page 14, Line 2, to Page 15, Line 12, and the deposition of Morton E. Pratt, Page 5, Line 22, to Page 10, Line 3. Concerning the sales of the ore and co-mingling at that point, see the deposition of Morton E. Pratt, Page 11, Line 8, to Page 12, Line 10.

Pertaining to whether or not there was any assumption of risk by the deceased which to point date has not been raised, see the case of Mecham v. Allen, 1 Utah 2d 79, 262 P2d 285, which puts upon the trier of facts the

presumption that the decendent used due care for his own safety in the absence of a prima facie showing to the contrary.

Also,, see the case of Evans v. Sturart, 17 Utah 2d 308, 410, P2d 999.

## CONCLUSION

Under these conditions, it can be clearly seen that plaintiffs' counsel entirely failed to make the trial court aware of plaintiffs' theory of the case, and the circumstances that brought same about; even though finding No. 5 is in contention that defendant failed in its duty of inspection and were in fact grossly negligent which proximately caused or contributed to Mr. Stevens' death, and that therefore recovery may be had under the provisions of Title 35-1-62 Utah Code Annotated 1953, on the question of a third person the trial court failed to make any finding whatsoever on this particular point, but went off on a question of employee-employer relationship.

Under these conditions there can be no question except that the trial court's memorandum decision is in error, and that this matter should be reversed, and an Iron County jury allowed to assess damages in connection with the death of Albert W. Stevens.

## RELIEF DESIRED

Plaintiffs desire that the memorandum decision be reversed; that the defendant United States Steel Corporation be given a reasonable time to answer, and that thereafter the matter be set for trial before an Iron County jury for findings and assessment of damages in accordance with the law.

Respectfully submitted,

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